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SANITARY LEGISLATION.

COURT DECISIONS.

MICHIGAN SUPREME COURT.

Garbage—Injunction Granted Forbidding Unauthorized Collection.

KELLEY v. DAVIDSON, 151 N. W. Rep., 671. (Mar. 18, 1915.)

Garbage, in itself, is a nuisance, and in the exercise of the police power a municipality may control the manner of its collection and disposition.

The board of health of a city, under authority of an ordinance, entered into a contract for the disposal of all garbage produced in the city, the collecting to be done by the city. The defendant, without a license, collected garbage, and the board secured an injunction prohibiting him from continuing the work. The court held that, although an injunction will not ordinarily be issued to prevent the commission of an act which constitutes a violation of an ordinance, the injunction was proper in this case to prevent the continuance of a nuisance.

BROOKE. C. J.: The bill of complaint in this case is filed by the board of health of the city of Grand Rapids against Benjamin Vink for the purpose of enjoining said Vink from engaging in the business of a scavenger in the city of Grand Rapids and—

From the removing of garbage, and such garbage as is described herein in this bill of complaint and from in any manner violating the said ordinances or amendments thereof.

It appears that the city of Grand Rapids, on the 18th day of July, 1898, passed an ordinance, which was amended on April 28, 1904, relative to the regulation, collection, removal, and cremation of garbage, etc. This ordinance authorized the board of health to enter into a contract with a suitable person—

For the purpose of furnishing proper vessels or tanks for the reception of garbage, offal, and all other insanitary matter, and for furnishing the necessary vehicles for collecting and removing the same in the manner directed by said board, or the said city of Grand Rapids, or said board of health under the rules and regulations of said board may collect the garbage, offal, and all other insanitary matter, or collect and dispose of such substances. Such board of health shall have the power to make such rules, regulations, and requirements as said board may from time to time deem for the best interests of the city; and said board may also divide said city into garbage districts, and shall have power to regulate the gathering of night soil and the collecting and conveying of dead animals, garbage, slop, and offal to the crematory or other place or places as may be directed by the said board. The person entering into a contract for the collection of and removal of such garbage, offal, dead animals, and other insanitary matter, as hereinbefore stated, shall, upon the recommendation of the said board of health, receive a license for that purpose, issued by the mayor of said city, and no license shall be issued to any other person, firm, or corporation for the gathering of such garbage; such person so licensed shall give a bond to the city of Grand Rapids, with sufficient sureties and in such amount as may be required by said board of health. * * * No person, firm, or corporation, excepting the city of Grand Rapids, shall collect or convey through the streets of said city any garbage, offal, dead animals, or other insanitary matter, unless he, they, or it shall have first received a license therefor issued by said city and execute a bond as required by this ordinance.

Section 7 of said ordinance provides that upon the conviction of, and failure to comply with, the conditions of the ordinance the offending person may be—

Subject to a fine of not less than \$1 nor more than \$25 and costs of prosecution, or by imprisonment at hard labor in the common jail of the county of Kent, or in any penitentiary, jail, workhouse, or house of correction of said city, in the discretion of the court or magistrate before whom a conviction may be had, for a period of not less than 5 days nor more than 90 days.

On February 10, 1913, the city of Grand Rapids entered into a contract with the Grand Rapids Garbage Holding Co., of Grand Rapids, Mich., by the terms of which the city undertook the task of the collection of all the garbage and the delivery of the same upon cars at a point certain within the city of Grand Rapids. The cars were to be furnished by the city, but were to be kept in repair by the Garbage Holding Co. It was further provided that the delivery of the garbage should be made by and under the management of the board of health of the city of Grand Rapids or such branch of the city government as may be provided by charter. The contract further provided that the Garbage Holding Co. should receive and dispose of the garbage in a certain specified manner, and—

In consideration of the delivery of such substances by the said party of the first part to said second party, said second party hereby agrees to pay to said party of the first party 50 cents per ton, payable monthly, during the time that this contract shall be in force.

Further:

Said first party hereby agrees to diligently prosecute all persons unlawfully collecting or removing garbage within said city of Grand Rapids at any and all times, and particularly upon 30 days' notice by said second party to said first party, in writing, or any person unlawfully collecting or removing garbage within said city.

Further:

Said first party hereby agrees that if the quality or quantity of garbage within said city is at any time during the life of this contract materially reduced by unlawful collection or removal to proportionately reduce the price per ton of said garbage to be paid by said second party to said first party hereunder while said reduction in quality or quantity continues.

The bill sets out the ordinance and contract, and avers that the defendant, without license, proceeded upon a day certain to collect garbage from certain hotels, boarding houses, and other places contrary to the provisions of said ordinance. It describes the character of the refuse, and states—

That the material being placed in said vessels and barrel consisted of tomatoes, bread, cooked meat, lemon and grapefruit peels, onions, clamshells, celery, beans (cooked), eggshells, cabbage, etc., all in a mushy and wet condition; that it was refuse and waste matter such as comes from tables and a kitchen; that it was of the nature of swill; that it had in part undergone process of fermentation and gave forth an odor very strong and disagreeable and injurious to the public health. * * * And your orator further shows and states the fact to be that the removal of garbage in this manner is a violation of the city ordinance, and that the removal of garbage of this character is injurious and dangerous to the public health, and should be restrained by the injunction and order of the courts; that the continuation of such removal of garbage in vessels of this character violates and sets at naught the costly methods of removal of garbage by city officials and endangers the public health and is a standing menace to the best efforts of the city, constituting damage not only in hundreds of dollars but probably thousands of dollars that can not well be measured.

To this bill of complaint the defendant filed an answer, admitting the fact that he had collected the garbage without a license, but denied that the matter collected had in part or at all begun fermentation, or that it gave forth a bad or disagreeable odor, or that it was in any way injurious to the public health. He further averred that the method employed by him for the removal of said

material was more sanitary and more satisfactory to the owners of said material than the method employed by the city.

The cause was heard in open court, and evidence introduced on behalf of the complainant tending to show that upon the day in question the defendant was engaged in collecting garbage in said city. Upon the particular occasion in question the defendant had upon his wagon some eight or nine cans and one barrel filled or partially filled with garbage. The substance was described by one witness as "soft and mushy like."

Q. Whether any of those cans or the barrel was tightly closed with tight covers?—A. I don't think there was one of them had a lid on that morning.

Q. Whether or not you are positive that there were some cans or the barrel that had garbage in it, as you have described it, that did not have a tight cover?—A. Yes, sir.

Q. You are positive of that, are you?—A. Yes, sir.

Q. What have you to say in reference to the cleanliness of this barrel and cans—whether or not there was any odor?—A. Well, there was some odor from them.

Q. Was it a good odor?—A. Pretty fair.

Q. What have you to say in reference to the odor?—A. There was a bad smell to it—sour.

Q. Disagreeable, was it?—A. A sour, disagreeable smell to it; yes.

Q. What have you to say in reference to the cleanliness of the barrel and cans?—A. They were not very clean—more or less greasy.

Q. On the outside?—A. The outside and inside, too.

Q. Greasy and dirty from the garbage that had been thrown upon them?—A. Grease and dust had settled on them.

A decree passed as prayed for by the complainant perpetually enjoining the defendant from engaging in the business of a scavenger and from the removing of garbage and of such garbage as is described, and from in any manner violating the ordinances of the city of Grand Rapids with reference to garbage or removal thereof.

The right of a city, in the reasonable exercise of its police power, to enact an ordinance covering the collection and disposal of garbage is not, as we understand it, questioned by counsel for appellant. Indeed, in view of the decisions of this and other courts, such right could not well be questioned. (*People v. Gardner*, 136 Mich., 693; 100 N. W., 126; *id.*, 143 Mich., 104; 106 N. W., 541. *Gardner v. Michigan*, 199 U. S., 335; 26 Sup. Ct., 106; 50 L. Ed., 212.)

On behalf of appellant, however, it is strenuously contended that a court of equity is without jurisdiction to entertain the bill in this case for the purpose of enjoining a breach of a municipal ordinance. Many cases are cited in support of this position, and among them the following: *Village of St. Johns v. McFarlan* (33 Mich., 72; 20 Am. Rep., 671); *City of Grand Rapids v. De Vries* (123 Mich., 570; 82 N. W., 269); *Micks v. Mason* (145 Mich., 212; 108 N. W., 707; 11 L. R. A. (N. S.), 653; 9 Ann. Cas., 291); *Dequeen v. Fenton* (98 Ark., 521); *Lyric Theater v. State* (98 Ark., 437; 136 S. W., 174; 33 L. R. A. (N. S.), 325); *Mayor v. Thorne* (7 Paige (N. Y.), 261); *Davis v. Am. Soc.*, etc. (75 N. Y., 362); *Village of New Rochelle v. Lang* (75 Hun., 608; 27 N. Y. Supp., 600); *Mayor v. Smith* (64 N. H., 380; 10 Atl., 700); *Rochester v. Walters* (27 Ind. App., 194; 60 N. E., 1101); *Waupun v. Moore* (34 Wis., 450; 17 Am. Rep., 446); and *Houlton v. Titcomb* (102 Me., 272; 66 Atl., 733; 10 L. R. A. (N. S.), 580; 120 Am. St. Rep., 492). Many other cases are cited, but the foregoing will be found sufficient to demonstrate the fact that usually courts of equity will not interfere and enjoin the breach of a penal ordinance. Most of the cases cited, however, will be found on examination to refer to ordinances prohibiting the erection of buildings of a certain character within certain prescribed fire limits. The fact is emphasized in many of the decisions that the erection of such a

structure is not in itself a nuisance, and, as was said in the case of *Mayor v. Thorne*, supra:

It is no part of the business of this court [chancery] to enforce the penal laws of the State, or the by-laws of a corporation, by injunction, unless the act sought to be restrained is a nuisance.

Counsel for appellant cite and rely on the case of *Micks v. Mason* (145 Mich., 212; 108 N. W., 707; 11 L. R. A. (N. S.), 653; 9 Ann. Cas., 291).. In that case the complainants sought to restrain the municipal authorities from razing a building said to have been erected by complainants in defiance of a municipal ordinance, which declared that a building erected in defiance of its terms should be deemed a nuisance. The bill was dismissed. We are unable to see how the conclusion reached in that case has any bearing upon the question presented in the case at bar, where the bill is filed by the municipality itself, or one of its boards, to enjoin a course of conduct on the part of the defendant which it is charged not only resulted in a public nuisance, but entailed upon the city considerable financial loss through its failure to secure, deliver, and receive pay for the garbage so unlawfully collected by the appellant.

In the case of *Detroit Realty Co. v. Barnett* (156 Mich., 385; 120 N. W., 804; 21 L. R. A. (N. S.), 585), this court held that equity has jurisdiction to abate a saloon, if a private nuisance, although the nuisance is also a breach of the criminal law, citing cases. Very lately, in the case of *Building Commission of Detroit v. Kunin* (148 N. W., 207), the equitable jurisdiction of the court was invoked to enjoin a threatened violation of a municipal ordinance relating to the erection of a building. We there held that, though the ordinance did not in terms declare a building erected in violation of its provisions a nuisance, by virtue of the provision in the ordinance providing for injunctive relief, the court would exercise equity jurisdiction.

A case upon its facts very much like the case at bar is that of *Reduction Company v. Sanitary Works* (199 U. S., 306; 26 Sup. Ct., 100; 50 L. Ed., 204). In that case the board of supervisors of the city and county of San Francisco had adopted an ordinance by the terms of which they had given to the assignor of the complainant company an exclusive right for 50 years to collect, cremate, and destroy within that city all garbage. A part of that ordinance consisted in a penal clause declaring any violation thereof punishable by a fine of not exceeding \$250, or by imprisonment for a term not exceeding 100 days. The bill was filed by the complainant for the purpose of obtaining a decree restraining the defendants by injunction from removing from said city any of the garbage or other material specified in the ordinance. The circuit court, Judge Morrow presiding, passed a decree giving the relief asked. (94 Fed., 693.) That decree was affirmed in the circuit court of appeals, Judge Hawley delivering the opinion of the court. (126 Fed., 29; 61 C. C. A., 91.) It was removed to the Supreme Court of the United States, and the opinion, which reviews all the authorities extending up to 1905, when it was written by Mr. Justice Harlan, affirms the decree of the lower court.

In the case of *Re Debs* (158 U. S., 564; 15 Sup. Ct., 900; 39 L. Ed., 1092) injunctive relief was given. The following headnotes indicate the holding of the opinion:

A court of equity has power to interfere by injunction in cases of public nuisance.

The jurisdiction of a court of equity to enjoin interferences with property rights is not destroyed by the fact that they are accompanied by or are violations of the criminal law.

In the case at bar the averments of the bill, without using the word "nuisance," set out facts which, if proven, would be sufficient upon which to predicate a finding that the method of collection adopted by the appellant was

in itself such as to constitute a public nuisance. The evidence as to that method is quoted supra. It is claimed on behalf of appellant that his method was quite as sanitary and free from objection as that adopted by the city. We think, however, that even if this be true, it is no answer to the charge that appellant was creating a nuisance. All authorities agree in holding that garbage in and of itself is a nuisance, and all agree that, in the exercise of the police power, a municipality may control the manner of its collection and disposition. It is obviously for the interests of the whole public that such offensive offal should be collected by persons under the immediate control of the municipal authorities, and this control the ordinance in question seeks to preserve.

The record discloses the fact that, besides defendant and appellant, several others in the city of Grand Rapids were engaged in an enterprise similar to his own. The difficulty of maintaining a constant surveillance over unlicensed and irresponsible collectors must be obvious to all. It is perhaps, however, not necessary to base determination upon this phase of the case. The bill avers and the evidence shows that the city had a direct financial interest in the garbage in question. Its right to compel delivery thereof to its own collectors and to receive pay therefor from the Garbage Holding Co. can not be questioned. The activity of the appellant and others in collecting the garbage prevented the city from receiving the agreed price for so much thereof as appellant and the other unlicensed collectors secured. It is easy to believe that the continued collection of garbage by appellant and others might so reduce the amount collected by the city and delivered to the Garbage Holding Co. under its contract as to render it impossible for the contract to receive practical performance. Nor can it be said that a prosecution under the penal clause of the ordinance would afford the city an adequate remedy. The offending party is entitled to appeal after conviction from court to court and thus cause delay. In the meantime the city is subjected to the loss of the material which, though not property in an ordinary sense, has under the contract between the city and the Garbage Holding Co. a certain fixed value determined by that contract.

For both reasons stated, we are of opinion that the decree of the court below perpetually enjoining defendant from collecting garbage within the city of Grand Rapids should be, and it is, affirmed.

NEW YORK SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT.

Milk—Adulterated—New York Act Construed.

PEOPLE v. MARTIN, 151 N. Y. Supp., 69. (Jan. 7, 1915.)

The New York act defining "adulterated milk" refers to all milk sold, and not merely to milk to be used in the making of butter, cheese, and other articles enumerated in the law.

GUY, J.: Plaintiff sued the defendant to recover a penalty of \$50 alleged to have been incurred under section 52 of the agricultural law for exposing for sale adulterated milk, as defined by subdivisions 1 and 2 of section 30 of said law. The respondent's counsel urges, and this seems to have been the view taken by the learned trial justice in the court below, that section 30, subdivisions 1 and 2, of the agricultural law, prescribe no standard for the selling or exposing for sale of adulterated milk, and that the use of such milk is only forbidden, and the standard prescribed, when such milk is used in the manufacture of butter, cheese, and the other articles enumerated in such section.